

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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NICHOLAS MARTIN,

Plaintiff,

v.

9:16-cv-717  
(TJM/TWD)

R. OEH, et al.,

Defendants.

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**Thomas J. McAvoy, SR. U.S.D.J.**

**DECISION and ORDER**

The Court referred this 42 U.S.C. § 1983 action, which alleges that prison guards and officials violated Plaintiff's constitutional rights, to the Hon. Thérèse Wiley Dancks, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 72.3(d) of the Local Rules of the Northern District of New York. The Report-Recommendation, dated November 28, 2017, recommends that the Court dismiss all but one of the claims in Plaintiff's Second Amended Complaint.

Plaintiff filed objections to the Report-Recommendation. When objections to a magistrate judge's Report-Recommendation are lodged, the Court makes a "*de novo*" determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. § 636(b)(1). After such a review, the Court may "accept, reject, or modify, in whole or in part, the findings or

recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.” Id.

Having reviewed the record *de novo* and having considered the issues raised in the Plaintiff’s objections, this Court has determined to accept and adopt the recommendations of Magistrate Judge Dancks for the reasons stated in the Report-Recommendation.

Accordingly:

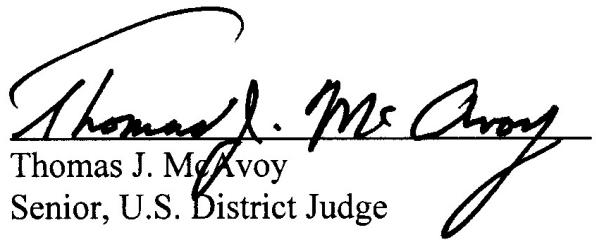
The Plaintiff’s objections to the Report-Recommendation, dkt. # 36, are hereby OVERRULED. The Report-Recommendation, dkt. # 35, is hereby ACCEPTED.

According:

1. the Plaintiff’s Second Amended Complaint, dkt. # 34, is accepted for filing as the operative pleading in this action;
2. Defendant Wyckoff is DIRECTED to respond to Plaintiff’s Eighth Amendment excessive force claim;
3. Plaintiff’s Fourteenth Amendment due process claim is hereby DISMISSED WITH PREJUDICE against Defendants Oey, Venetozzi, and Annuuci;
4. Plaintiff’s claim based on a false misbehavior report against Defendants Wyckoff, Mitchell, Wentzel, and Oey is hereby DISMISSED WITH PREJUDICE; and
5. Plaintiff’s Eighth Amendment conditions of confinement and medical indifference claims are hereby DISMISSED WITHOUT PREJUDICE.

**IT IS SO ORDERED**

Dated: December 27, 2017



Thomas J. McAvoy  
Senior, U.S. District Judge